AWESOME BROADCASTING SDN BHD v. MYTV BROADCASTING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[CIVIL SUIT NO: WA-22NCVC-605-10-2023]
15 FEBRUARY 2024

Abstract – *A person shall not apply to the court for reliefs unless that person has first exhausted all other domestic remedies available to him under an applicable Act. Pursuant to s. 120 of the Communications and Multimedia Act 1998, an aggrieved party can lodge an appeal to the appeals tribunal (if he is aggrieved or his interest is adversely affected by a decision or direction (but not a determination) of the Malaysian Communications and Multimedia Commission, or to the Minister (if he is aggrieved or his interest is adversely affected by a determination of the MCMC)). Further, all parties affected by a court order must be made parties to a suit as a failure to add a necessary and proper party is fatal to an application.*

CIVIL PROCEDURE: *Injunction – Ex parte interim injunction – Application for – Application to restrain notice of suspension of digital services due to non-payment of indebted sum – Suspension order permitted by Malaysian Communications and Multimedia Commission ('MCMC') – Whether application premature – Whether all other domestic remedies exhausted before applying to court for reliefs – Whether proper appeal mechanism under s. 120(1) of Communications and Multimedia Act 1998 is to challenge decision at appeals tribunal or Minister – Failure to add proper and necessary party to suit – Whether fatal – Whether there were serious issues to be tried – Whether application ought to be dismissed*

The plaintiff filed encl. 7 for an *ex parte* interim injunction to restrain the defendant from suspending the plaintiff's license to provide digital terrestrial television services ('DTT services') within Malaysia pending trial. The plaintiff held a license granted by the Minister of Communications and Multimedia Malaysia. Under the terms of this license, the plaintiff was permitted to provide content application services such as video, television programming and broadcasting activities exclusively through terrestrial free to air ('FTA') TV *via* a digital terrestrial television ('DTT') broadcasting. The defendant was the sole provider of DTT services in Malaysia. The defendant and the plaintiff entered into an access agreement for the provision of digital terrestrial television services ('access agreement') whereby the plaintiff requested access to the services of the defendant in respect of its content application services through the DTT of the defendant and distribution network within Malaysia for a sum of RM6,000,000 per annum. Pursuant to ss. 90, 91 and 150 of the Communications and Multimedia Act 1998

('MCMC Act'), the access agreement was registered with the Malaysian Communications and Multimedia Commission ('MCMC'). Subsequently, the parties entered into a supplemental agreement which amended some terms in the access agreement as required by a determination made by the MCMC. Following the expiry of the access agreement and supplemental access agreement after one year, the plaintiff obtained access to the services of the defendant concerning its content application services through the DTT and distribution network within Malaysia on a monthly advance issued invoice basis at the rate of RM500,000 per month. The plaintiff, however, began defaulting on payments and failed to make any payment to the defendant. A meeting was held between the plaintiff and the defendant where the plaintiff contended that certain other television stations were being levied charges amounting to merely 50% of the charges being borne by the plaintiff for the same DTT service. The parties could not resolve their differences and a mediation was held by the MCMC, which was not successful. The defendant then issued a letter to the plaintiff, stating that following the mediation process conducted by the MCMC, the outstanding amount due from the plaintiff for the provision of DTT services stood at RM5,038,191.78, equating to nine months of service including late payment charges. The plaintiff wrote to MCMC and the defendant, expressing their willingness to enter into a standard definition ('SD') access agreement with the defendant at RM2,500,000 per annum. However, the plaintiff refused to agree to the settlement plan for the unpaid invoices and urged MCMC to address the unlevel playing field of the pricing and market failure. The MCMC rejected the complaint and viewed the plaintiff's allegations as unsubstantiated. The defendant then, with the permission of the MCMC, issued a notice of suspension to the plaintiff indicating the suspension of DTT services, due to the non-payment of the indebted sum amounting to RM5,107,232.86 ('notice of suspension'). Consequently, the plaintiff filed a writ action and this injunction application to restrain the defendant from putting into effect the notice of suspension. The plaintiff contended that there were *bona fide* serious issues to be tried. The plaintiff also submitted that damages would not be an adequate remedy to compensate the plaintiff if the interim injunction was not granted and that the balance of convenience unequivocally favoured the granting of the injunction. The defendant, in opposing the injunction, submitted that (i) it would in effect interfere with the regulator and had the effect of restraining it from carrying out its obligations; (ii) the plaintiff had used the wrong forum to do so; (iii) the plaintiff had failed to name the MCMC as a defendant in this proceeding, despite the fact that the MCMC was an interested and affected party. Accordingly, it was the defendant's stand that the balance of convenience must tilt against the plaintiff.

Held (dismissing application):

(1) A person shall not apply to the court for reliefs unless that person has first exhausted all other domestic remedies available to him under an applicable Act. Herein, the plaintiff had prematurely filed the writ action and the interim injunction in support of the writ action. Could the plaintiff contend that it was entitled to file a suit against the defendant alone without exhausting the domestic remedies prescribed by Parliament under the MCMC Act on the ground that it was not suing the MCMC? The answer was no as the plaintiff's case against the defendant was inextricably linked to its case against MCMC as the regulator. (paras 35, 36, 41 & 42)

(2) The plaintiff had availed themselves of the procedure of having their dispute heard and decided by the MCMC under s. 86 of the MCMC Act. The MCMC had rejected the plaintiff's complaints as being unsubstantiated. The proper appeal mechanism under s. 120(1) of the MCMC Act is to challenge the MCMC's decision at the appeals tribunal (if it is a decision or direction of the MCMC) or to appeal to the Minister (if it is a determination by the MCMC). It was only when the appeal to the appeals tribunal or to the Minister as the case may be fails that the plaintiff has the right to file for judicial review pursuant to s. 121 of the Act, or to file for other court reliefs against the defendant and MCMC as it deemed fit. (paras 44-46)

(3) The plaintiff alleged that it was a victim of inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices and breach of contract. All these allegations had been rejected by MCMC. As it was clear the plaintiff was not happy with the findings of the MCMC, it should exhaust its appeal process under the MCMC Act and not run to the court for relief prematurely. (paras 50 & 51)

(4) A further ground to dismiss the plaintiff's application was the principle that 'all parties affected by a court order must be made parties to the suit.' The failure of the plaintiff to add MCMC as a second defendant was fatal to its application. The failure by a party applying for an interim injunction to add a necessary party as a defendant meant that there were no serious issues to be tried. The MCMC was both a proper and necessary party. Absent the MCMC as a defendant, as a matter of law, there could be no serious issue to be tried. (paras 52-58)

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd & Ors [1975] 1 All ER 504 ***(refd)***

Baskin Robbins International Co & Anor v. Avonday Sdn Bhd [1992] 2 CLJ 1198; [1992] 2 CLJ (Rep) 201 HC ***(refd)***

Braganza v. BP Shipping Ltd & Anor [2015] UKSC 17 ***(refd)***

Brogden v. Investec Bank Plc [2014] EWHC 2785 ((Comm) ***(refd)***

A *First Energy (UK) Ltd v. Hungarian International Bank Ltd [1993] 2 Lloyd's Rep 194* ***(refd)***
Hong Kong Vegetable Oil Co Ltd v. Malin Sirinaga Wicker & Ors [1977] CLJU 35; [1977] 1 LNS 35 HC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***
Kwong Hing Enterprises Sdn Bhd & Anor v. Diamond C Management Corporation [2023] CLJU 346; [2023] 1 LNS 346 HC ***(refd)***
B *Malaysia Airports Sdn Bhd v. My Jet Xpress Airlines Sdn Bhd [2023] MLJU 2236* ***(refd)***
Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd [2003] 1 CLJ 153 CA ***(refd)***
Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal [2014] 3 CLJ 733 CA ***(refd)***
Saujana Resort (M) Bhd v. Chin Cheen Foh & Ors And Another Appeal [2021] 3 CLJ 71 CA ***(refd)***
C *Scomi Group Bhd v. Gelombang Global Sdn Bhd & Anor And Another Application [2020] 9 CLJ 122 HC* ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Serba Dinamik Holdings Bhd v. Ernst & Young Consulting Sdn Bhd [2022] CLJU 1634; [2022] 1 LNS 1634 HC ***(refd)***
D *Socimer International Bank Ltd v. Standard Bank London Ltd [2008] EWCA Civ 116* ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***
Ta Win Industries (M) Sdn Bhd v. Ketua Pengarah Kastam Malaysia & Anor [2021] MLJU 157 ***(refd)***
Vero Insurance New Zealand Ltd v. Fleet Insurance & Risk Management Ltd HC Auckland CIV [2007] NZHC 2145 ***(refd)***

E **Legislation referred to:**
Communications and Multimedia Act 1998, ss. 86, 90, 91, 120(1), 121, 150

For the plaintiff - Muhammad Shafee Abdullah & Wee Yeong Kang; M/s Shafee & Co
For the defendant - Gopal Sreenevasan & Celine Lim Tze Hui; M/s Cheang & Ariff

F *Reported by Suhainah Wahiduddin*

JUDGMENT
(encl. 7)

Leong Wai Hong JC:

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Introduction

[1] The plaintiff filed encl. 7 for an *ex parte* interim injunction to restrain the defendant from suspending the plaintiff's licence to provide digital terrestrial television services ("DTT services") within Malaysia pending
H trial.

[2] I heard the plaintiff's lead counsel, Tan Sri Muhammad Shafee bin Abdullah, *ex parte* on 1 November 2023 and granted para. 1 of encl. 7 pending *inter parte* hearing on 10 November 2023, subject to undertaking to damages by the plaintiff. I then heard encl. 7 *inter parte* on 10 November
I 2023, 27 November 2023 and 8 December 2023 and reserved my decision. I dismissed the plaintiff's application on 11 January 2024 on these two broad grounds:

First Ground

(i) a person shall not apply to the court for reliefs unless that person has first exhausted all other domestic remedies available to him under an applicable Act;

(ii) in the instant case, the Communications And Multimedia Act 1998 ("MCMC Act") provides for an aggrieved party, *ie*, the plaintiff here, to lodge an appeal to the Appeals Tribunal if he is aggrieved or his interest is adversely affected by a decision or direction (but not a determination) of the Malaysian Communications and Multimedia Commission ("MCMC"), or to the Minister if he is aggrieved or his interest is adversely affected by a determination of the MCMC pursuant to s. 120 of the MCMC Act; and

(iii) if the plaintiff is still not satisfied, then the plaintiff can file for judicial review pursuant to s. 121 of the MCMC Act;

Second Ground

(iv) all parties affected by a court order must be made parties to the suit. In the instant case, the MCMC has not been made a defendant to the suit.

***Erinford* Injunction**

[3] At the plaintiff's oral application, I had granted an *Erinford* injunction in favour of the plaintiff effective till 11 March 2024. I allowed the *Erinford* based on the principles set out in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; [1996] 3 AMR 3733 and *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147.

[4] The plaintiff has now filed an appeal dated 19 January 2024 to the Court of Appeal against my decision. I now give my full grounds of judgment. In the grounds and in the letters exhibited by parties, the plaintiff may sometimes be referred to as Awesome TV and the defendant as MYTV.

[5] For the record, the plaintiff filed written submissions encls. 19, 26 and 35. The defendant filed written submissions encls. 30, 32 and 37.

Relevant Background Facts

[6] I set down below the relevant facts in chronological order that I can glean from parties' submissions. My task is not made easier as both counsels failed to narrate all the relevant background facts in chronological order in their respective submissions. Instead, counsels set down only selective background facts that they rely on to support their arguments.

Parties And Agreements Between The Parties

[7] The plaintiff holds a license granted by the Minister of Communications and Multimedia Malaysia. Under the terms of this licence, the plaintiff is permitted to provide content application services such as video, television programming and broadcasting activities exclusively through terrestrial free to air ("FTA") TV *via* a digital terrestrial television ("DTT") broadcasting.

[8] The defendant is the sole provider of DTT services in Malaysia.

[9] The defendant was appointed by the Government of Malaysia to develop and operate the infrastructure and network facilities for DTT in Malaysia.

[10] Thus, any television station holding a licence to provide content application services, which includes the plaintiff here, needs to use the DTT service operated by the defendant.

[11] On 17 July 2020, the defendant and the plaintiff entered into an access agreement for the provision of Digital Terrestrial Television Services ("access agreement"), whereby the plaintiff requested access to the services of the defendant in respect of its content application services through the DDT of the defendant and distribution network within Malaysia for a sum of RM6,000,000 per annum.

(See the plaintiff's written submissions encl. 19 para. 7 and exh. "ATV-2" at pp. 31 to 108 of the plaintiff's affidavit in support – encl. 4).

[12] Pursuant to ss. 90, 91 and 150 of the MCMC Act, the access agreement was registered with the MCMC.

[13] Subsequently, the parties entered into a supplemental agreement dated 17 July 2021 which amended some terms in the access agreement as required by a determination made by the MCMC. (See reply affidavit of the defendant encl. 16 at p. 10).

[14] The access agreement was only for one year and expired on 17 July 2021. Following the expiry of the access agreement and supplemental access agreement, the plaintiff obtained access to the services of the defendant concerning its content application services through the DTT and distribution network within Malaysia on a monthly advance issued invoice basis at a rate of RM500,000 per month. (See the plaintiff's affidavit in support encl. 4 at para. 9 and exh. "ATV-4" at pp. 115 to 205).

Plaintiff Defaults On Payments To The Defendant

[15] The plaintiff began defaulting on payments to the defendant in April 2022. These arrears were subsequently paid up by the plaintiff. However, the plaintiff again failed to make any payment to the defendant for access for the platform between February 2023 to October 2023.

Disputes Between The Parties

[16] In August 2023, a meeting was held between the managing director and chief operating officer of the plaintiff and the chief executive officer and chief operating officer of the defendant.

[17] In that meeting, the plaintiff contended that certain other television stations were being levied charges amounting to merely 50% of the charges being borne by the plaintiff for the same DTT service. Parties could not resolve their differences.

Mediation Before The MCMC

[18] On 5 October 2023, a mediation was held by the MCMC. It was not successful.

[19] On 6 October 2023, the defendant issued a letter to the plaintiff stating that following the mediation process conducted by the MCMC on 5 October 2023, the outstanding amount due from the plaintiff for the provision of DTT service stands at RM5,038,191.78, equating to nine months of service including late payment charges.

[20] The letter dated 6 October 2023 proposed a settlement to transition the service to standard definition ("SD") at RM2,500,000 per annum, contingent on the plaintiff adhering to a payment plan for the outstanding amount. The plan requires an initial payment of RM2,000,000 within seven days from the letter date, with the remaining unpaid balance to be cleared within the next four months, alongside a security sum of RM625,000.

(See the plaintiff's affidavit in support encl. 4 at para. 13. A copy of the letter from the defendant dated 6 October 2023 is marked and exhibited as "ATV-5").

Complaint By The Plaintiff To MCMC

[21] By a letter dated 9 October 2023, the plaintiff wrote to the MCMC and the defendant expressing their willingness to enter into an SD access agreement with the defendant at RM2,500,000 per annum starting November 2023. However, the plaintiff refused to agree to the settlement plan for the unpaid invoices. The plaintiff also urged MCMC to "address the unlevel playing field of the pricing by MYTV that is also a function of the unfair exclusion of Awesome TV from receiving subsidies from MCMC. We hope MCMC can mediate the situation to ensure fair treatment."

(See the plaintiff's affidavit in support encl. 4 at para. 14. A copy of the letter from the plaintiff dated 9 October 2023 is marked and exhibited as "ATV-6").

[22] By a reply letter dated 12 October 2023, the MCMC rejected the complaint lodged by the plaintiff. MCMC said, and I quote:

> 3. Following the discussions held and based on the evidence provided by both parties, *MCMC's findings are as follows*:

A (i) MYTV does not appear to be engaging in any anti-competitive conducts that has, or may have, the effect of substantially lessening competition in the television broadcasting market, as the price reduction offered by MYTV to some free-to-air ("FTA") broadcasters is part of a promotional strategy approved under the stimulus grant to encourage new broadcasters on regulated price in the Mandatory Standard on Access Pricing for channel and bandwidth charges. Thus, ATV is already enjoying discounted pricing;

(ii) *Based on the evidence that presented by MYTV, ATV has an outstanding payment of RM4,926,410.97* which comprise of six (6) months access fees from February 2023 until July 2023 of RM3 million, late payment charges of RM426,410.97 from May 2022 until February 2023 and a sum of RM1.5 million for the security deposit. *Despite having revised the payment plans and granting extension of time, ATV had failed to honour the payment plan. In view of this, MYTV had informed ATV that it may suspend ATV services due to default payment*. MYTV further highlighted that the existing access agreement that is due for renewal has not been signed by ATV; and

(iii) We take note of ATV's allegation on inadequate TV household on MYTV's platform. We wish to inform that viewers on FTA platform have increased and MYTV will continue to carry out aggressive promotional activities to achieve the target of 7 million viewers by end of 2023, as set by the National Digital Taskforce.

4. *Based on the above findings, we are of the view that ATV's allegations of unlevel playing field and market failure are unsubstantiated*. Unquote.

(emphasis added)

F (See the plaintiff's affidavit in support encl. 4 at para. 15. A copy of the letter from the MCMC dated 12 October 2023 is marked and exhibited as "ATV-7").

[23] By a letter dated 19 October 2023, the defendant issued a notice of suspension to the plaintiff in accordance with cl. 8.3 of the access agreement G dated 17 July 2020, indicating the suspension of DTT services effective from 2 November 2023 at 12.01am, due to the non-payment of the indebted sum amounting to RM5,107,232.86 as of the said date. ("notice of suspension").

(See the plaintiff's affidavit in support encl. 4 at para. 16. A copy of the H notice of suspension letter from the defendant dated 19 October 2023 is marked and exhibited as "ATV-8").

[24] The defendant had earlier written to MCMC for permission to suspend the plaintiff and received permission from the MCMC to do so before issuing the notice of suspension to the plaintiff. This can be seen from the defendant's I letter to MCMC dated 18 August 2023 and the reply from MCMC dated 17 October 2023. (See encl. 16 p. 92 and encl. 17 p. 234).

[25] Consequently, the plaintiff filed a writ action and this injunction application before me to restrain the defendant from putting into effect the notice of suspension.

The Plaintiff's Basis For Interim Injunction

[26] The plaintiff contends that there are *bona fide* serious issues to be tried and that an interlocutory injunction is warranted to maintain the *status quo* pending the determination of these issues at trial.

[27] The plaintiff submits the *bona fide* serious issues are "inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices, and breach of contract." The plaintiff says it has substantiated its claims with factual assertions demonstrating a clear cause of action against the defendant. (Plaintiff's written submissions encl. 19 paras. 22 and 25).

[28] The plaintiff relies on *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 for general principles on the granting of interim injunction pending trial.

[29] For cases in support of serious issues to be tried – *ie*, the authorities demonstrate that reliance on the concept of "absolute discretion" is no longer in law absolute but rather subject to legal scrutiny – the plaintiff relies on cases like:

(i) the English Court of Appeal case of *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] EWCA Civ 116; [2008] All ET (D) 331 (Feb) at [66] that "a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused".

(ii) *Brogden v. Investec Bank Plc* [2014] EWHC 2785 (Comm); [2014] IRLR 924 that "a discretion ... is subject to the implied constraints that it must be taken in good faith, for proper purposes and not in an arbitrary, capricious or irrational manner";

(iii) the United Kingdom Supreme Court case of *Braganza v. BP Shipping Ltd & Anor* [2015] UKSC 17 at "[18] ... It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting

parties as there often will be in an employment contract. *The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised*, a term which may vary according to the terms of the contract and the context in which the decision-making power is given" (emphasis added);

(iv) the New Zealand High Court case of *Vero Insurance New Zealand Ltd v. Fleet Insurance & Risk Management Limited HC Auckland CIV* [2007] NZHC 2145 at "[42] … I do not consider that the words "absolute discretion" (in a contract) necessarily exclude the application of a duty of good faith";

(v) the UK Court of Appeal case of *First Energy (UK) Ltd v. Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 which said "... A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract …".

[30] The plaintiff submits that damages would not be an adequate remedy to compensate the plaintiff if the interim injunction is not granted by this Honourable Court. The plaintiff relies on *Baskin Robbins International Co & Anor v. Avonday Sdn Bhd* [1992] 2 CLJ 1198; [1992] 2 CLJ (Rep) 201 – p. 205 E-F Shaik Daud Ismail J who held:

> The second criteria for the Court to consider is whether damages would be an adequate remedy. On the evidence before me I am of the view that *if the plaintiff succeeds at the trial without this injunction, it would not be possible to assess the amount of damages they would have suffered as it would not be possible to account the number of customers that they had thereby been deprived of. I do not consider therefore that in the circumstances of this case damages would be an adequate remedy …*
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> (emphasis added)

[31] The plaintiff also submits that the balance of convenience unequivocally favours the granting of the injunction.

The Defendant's Rebuttal

[32] The defendant's lead counsel Mr Gopal Sreenevasan, opposes the injunction (see written submission encl. 30 para. 4) on the following grounds:

(i) as the plaintiff concedes in its affidavit, all its complaints have been considered and rejected by MCMC, the regulator who administers and regulates the MCMC Act. The agreement which is the subject matter of this suit is registered under the MCMC Act and both the plaintiff and defendant are licensed under the MCMC Act. The MCMC has also approved the suspension of the plaintiff. As a result, the defendant submits that this injunction in effect interferes with the regulator and has

the effect of restraining it from carrying out its obligations. The plaintiff has used the wrong forum to do so. (See encl. 15 – p. 44, encl. 4 – p. 11, encl. 17 – p. 234). ("the wrong forum argument");

(ii) the plaintiff has failed to name the MCMC as a defendant in this proceeding, despite the fact that the MCMC is an interested and affected party. The law is that the absence of a necessary party means that there is no serious issue to be tried;

(iii) given that the plaintiff is providing content on the defendant's platform, its damages (from for example, advertising or subscriptions) are clearly determinable and adequate; and

(iv) accordingly, given the public interest in ensuring that the MCMC can continue with its statutory functions, the balance of convenience must tilt against the plaintiff.

My Analysis

[33] I begin with the law on interim injunction.

The Law On Interim Injunction

[34] In essence, the court will exercise its discretion to grant an interlocutory injunction to a plaintiff if the following considerations are satisfied:

(i) the plaintiff has satisfied the court that there is a *bona fide* and serious question to be tried in respect of the plaintiff's cause of action against the defendant. To determine whether there is a *bona fide* and serious question to be tried, the judge need not make any determination on the merits of the claim. It is sufficient if the judge identifies the issues raised and decides whether these are serious enough to merit a trial. Thus, if the plaintiff fails to show there is a *bona fide* and serious question to be tried in respect of the plaintiff's cause of action against the defendant, the court shall refuse to grant the interlocutory injunction. There is no necessity to proceed to the next consideration;

(ii) damages are not an adequate remedy for the plaintiff. Damages will not be an adequate remedy if it is not possible to assess the amount of damages the plaintiff would have suffered if he wins at trial. (See *Baskin Robbins International Co & Anor v. Avonday Sdn Bhd* [1992] 2 CLJ 1198; [1992] 2 CLJ (Rep) 201 p. 205 E-F Shaik Daud Ismail J). Damages will also not be an adequate remedy even if the damages that the plaintiff would suffer are monetary in nature and quantifiable if the defendant is not in a position or does not have the financial means to pay the damages. (See *Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd* [2003] 1 CLJ 153; [2002] 2 MLRA 258; [2003] 1 MLJ 130; [2003] 1 AMR 378 at 144 C-D, quoting Lord Diplock in *American Cyanamid*

A *Co v. Ethicon Ltd & Ors* [1975] 1 All ER 504 and *Scomi Group Bhd v. Gelombang Global Sdn Bhd & Anor And Another Application* [2020] 9 CLJ 122; [2020] MLRHU 377; [2020] 12 MLJ 708; [2020] 5 AMR 808 at [113] Ong Chee Kwan JC);

B (iii) the balance of convenience lies in favour of a grant of an interlocutory injunction. In this context, the judge must consider where the justice of the case lies. In making his assessment, he must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. The objective is to produce a just result for the period between the decision on the application and the trial proper; and

C (iv) there is no policy or equitable ground to refuse an interlocutory injunction.

(See *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 Gopal Sri Ram JCA and *Kwong Hing Enterprises Sdn Bhd* D *& Anor v. Diamond C Management Corporation* [2023] CLJU 346; [2023] 1 LNS 346; [2023] MLRHU 287 at [32]).

Should I Grant The Interim Injunction?

Is There A Bona Fide And Serious Question To Be Tried?

E **[35]** I am of the view that the plaintiff has failed to satisfy the court that there is a *bona fide* and serious question to be tried in respect of the plaintiff's cause of action against the defendant.

[36] In my view, the plaintiff has prematurely filed the writ action and the interim injunction in support of the writ action. The defendant calls this error F of the plaintiff the wrong forum argument. The relevant principle of law is – a person shall not apply to the court for reliefs unless that person has first exhausted all other domestic remedies available to him under an applicable Act.

The Law On Exhaustion Of All Domestic Remedies Before Filing In Court

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[37] I consider the law on exhaustion of all domestic remedies before filing in court settled law.

[38] What this means is that where a statute has provided for a further internal remedy to an aggrieved party, then recourse must first be had to that H grievance mechanism. In other words, the aggrieved party must exhaust that internal remedy first before running to the courts for relief.

(See *Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal* [2014] 3 CLJ 733; [2014] 4 MLJ 377; *Ta Win Industries (M) Sdn Bhd v. Ketua Pengarah Kastam Malaysia & Anor* I [2021] MLJU 157 at [20] and [25](c) and *Malaysia Airports Sdn Bhd v. My Jet Xpress Airlines Sdn Bhd* [2023] MLJU 2236 at [61]).

[39] In *Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal* [2014] 3 CLJ 733; [2014] 4 MLJ 377, Abang Iskandar JCA said: A

> [18] Having perused that provision, *we would agree with learned SFC that such recourse could only be had after the respondent taxpayer had exhausted the available remedy as provided for by Parliament* within the four corners of the Sales Tax Act 1972. That would necessarily mean that the respondent taxpayer must have exhausted its appeal remedy with the Director General of Customs in respect of the impugned Notice as envisaged under s. 68 of the Sales Tax Act 1972. While s. 141N seems to suggest that the aggrieved party may go to the High Court, it does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director General. B C
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> [19] Again, with regard to the statutory remedy as contained under s. 68 of the Sales Tax Act 1972 we are of the view that the position in such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v. Government of Sarawak & Anor* [1970] 2 MLJ 41, *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185, and *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v. Ketua Pengarah Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505. *These cases have decided that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts* for what is essentially a discretionary relief. D E
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> (emphasis added)

[40] Rozi Bainon JC in the recent case of *Malaysia Airports Sdn Bhd v. My Jet Xpress Airlines Sdn Bhd* [2023] MLJU 2236 applied the Court of Appeal decision of *Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal* [2014] 3 CLJ 733*;* [2014] 4 MLJ 377, Abang Iskandar JCA. This is what the learned Judicial Commissioner said: F

> [61] This Court emphasised it again that: G
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> (a) *the Commission is an entity who possesses comprehensive knowledge of aviation matters and is fully equipped and clothed with the necessary skills and powers to decide on the disputes as enumerated above.*
>
> (b) this Court should not rob the Defendant's statutory right to refer the disputes/issues/questions to the Commission. H
>
> (c) *this Court should not allow the Plaintiff to bypass and or to circumvent section 74 of Act 771.*
>
> (d) …
>
> (e) in the case of *Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd And Ors And Another Appeal* [2014] 4 MLJ 377; [2014] 1 LNS 264, the Court of Appeal held that: I

> ... with regard to the statutory remedy ... we are of the view that the position in such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v. Government of Sarawak & Anor* [1970] 2 MLJ 41, *Government of Malaysia & Anor v. Jagdis Singh* 2 MLJ 185, and *Robin Tan Pang Heng v. Ketua Pengarah Sekerja Malaysia & Anor* [2010] 9 CLJ 505. *These cases have decided that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism*. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief.
>
> [62] ...
>
> [63] The intention of Act 771 is clearly to provide for the players in the aviation industry to commence the grievances to the Commission first before filing the case in the Court.
>
> (emphasis added)

Application Of Law To Facts

[41] Can the plaintiff contend that it is entitled to file a suit against the defendant alone without exhausting the domestic remedies prescribed by Parliament under the MCMC Act on the ground that it is not suing the MCMC? In short, can the plaintiff carve out its case against the defendant from its case against MCMC?

[42] The answer is no as the plaintiff's case against the defendant is inextricably linked to its case against MCMC as the regulator. The plaintiff's contention is not even supported by its own supporting affidavit (encl. 4) filed before me. This is what the plaintiff had said in its encl. 4 paras. 14 to 17:

> 14. *On 09.10.2023, the Plaintiff wrote a letter to the MCMC and the Defendant expressing their willingness to enter into a SD access agreement with the Defendant* at RM2,500,000.00 per annum starting November 2023. However, the Plaintiff contested the settlement payment based on the invoiced values of the Defendant, asserting that the SD access agreement should not be tied to these invoices. ... A copy of the letter from Awesome Broadcasting Sdn Bhd dated 09.10.2023 is marked and exhibited as "ATV-6"
>
> 15. *On 12.10.2023, the MCMC responded to the Plaintiff's letter dated 09.10.2023, albeit addressing only certain issues raised therein, and did so in an unsatisfactory manner*. A copy of the letter from MCMC dated 12.10.2023 is marked and exhibited as "ATV-7"
>
> 16. On 19.10.2023, *the Defendant issued a notice of suspension to the Plaintiff in accordance with Clause 8.3 of the access agreement* dated 17.07.2020, indicating the suspension of DTT services effective from 02.11.2023 at 12.01 am, due

to the non-payment of the purported indebted sum amounting to RM5,107,232.86 as of the said date ("notice of suspension"). Further, *the Defendant received permission from the MCMC before issuing the notice of suspension to the Plaintiff.* ... A copy of the notice of suspension dated 19.10.2023 is marked and exhibited as "ATV-8"

17. On 19.10.2023, *the Plaintiff responded to* the letter dated 12.10.2023 from the *MCMC by stating the following*:

(a) the Plaintiff claims an overpayment to the Defendant, totalling a loss of 30 months of service at the rate charged to other entities. This discrepancy, *coupled with a lack of subsidy from MCMC*, places the Plaintiff at an economic disadvantage, having paid RM15 million to date at RM500,000 per month;

(b) ...

(c) the monopolistic structure within the Malaysian broadcasting sector, ..., hinders fair business negotiations with the Defendant. *This situation calls for MCMC's critical intervention similar to the role Malaysian Competition Commission plays in other sectors*;

(d) *the Plaintiff urges the MCMC to take several actions: prevent the Defendant from suspending* the broadcasting of the Plaintiff, *approve a retrospective subsidy for Access Pricing for the Plaintiff, direct the Defendant to adjust the pricing* to align with other entities, ... A copy of the letter from Awesome Broadcasting Sdn Bhd is marked and exhibited as "ATV-9"

(emphasis added)

[43] From the above, it is clear the plaintiff's grievance is inequitable treatment and lack of action by MCMC as a regulator. To recap, this is what the managing director of the plaintiff affirmed on oath in his affidavit:

16(d) *the Plaintiff urges the MCMC to take several actions: prevent the Defendant from suspending* the broadcasting of the Plaintiff, *approve a retrospective subsidy for Access Pricing for the Plaintiff, direct the Defendant to adjust the pricing* to align with other entities ...

(emphasis added)

[44] The plaintiff has availed themselves of the procedure of having their dispute heard and decided by the MCMC under s. 86 of the MCMC Act. The MCMC has rejected the plaintiff's complaints as being unsubstantiated.

(See the plaintiff's affidavit in support encl. 4 at para. 15. A copy of the letter from the MCMC dated 12 October 2023 is marked and exhibited as "ATV-7").

[45] The proper appeal mechanism under s. 120(1) of the MCMC Act is to challenge MCMC's decision at the appeals tribunal (if it is a decision or direction of the MCMC) or to appeal to the Minister (if it is a determination by the MCMC).

[46] It is only when the appeal to the appeals tribunal or to the Minister as the case may be fails that the plaintiff has the right to file for judicial review pursuant to s. 121 of the Act, or to file for other court reliefs against the defendant and MCMC as it deems fit.

[47] This is clear from ss. 120 and 121 of the MCMC Act which read:

> 120(1) Subject to subsection (2), a person who is the *aggrieved or whose interest is adversely affected by a decision or direction* (but not a determination) *of the Commission* made pursuant to the performance its powers and functions under this Act or its subsidiary legislation, *may appeal to the Appeal Tribunal* for a review of the merits and the process of certain decisions or directions of the Commission, unless the matter is not subject to an appeal to the Appeal Tribunal.
>
> (2) Subject to subsection 17(1), *the Minister* may determine the decisions or directions of the Commission *which are not subject to appeal to the Appeal Tribunal* under subsection (1).
>
> 121(1) *A person affected by a decision or other action of the Minister or Commission may apply to the court for a judicial review* of such decision or other action.
>
> (2) A person shall *not apply to the court for a judicial review* unless that person has first exhausted all other remedies provided under this Act.
>
> (emphasis added)

[48] On this ground alone, the application for injunction can be dismissed. I now consider the other grounds.

No Serious Issue To Be Tried

[49] It is an undisputed fact that the plaintiff has failed to pay arrears of RM4,926,410.97 owed to the defendant. This is what MCMC said in its letter to the plaintiff which I have set out above:

> *Based on the evidence that presented by MYTV, ATV has an outstanding payment of RM4,926,410.97* which comprise of six (6) months access fees from February 2023 until July 2023 of RM3 million, late payment charges of RM426,410.97 from May 2022 until February 2023 and a sum of RM1.5 million for the security deposit. *Despite having revised the payment plans and granting extension of time, ATV had failed to honour the payment plan. In view of this, MYTV had informed ATV that it may suspend ATV services due to default payment*.
>
> (emphasis added)

[50] The plaintiff alleged it is a victim of, and I quote, "inequality of bargaining power, discriminatory pricing, unfair contractual discretion, unfair business practices, and breach of contract." Unquote (see plaintiffs written submissions encl. 19 para. 25). The plaintiff's end game is that it is not obliged to pay the arrears.

[51] The short answer to this is that all these allegations have been rejected by MCMC. As it is clear the plaintiff is not happy with the findings of the MCMC, it should exhaust its appeal process under the MCMC Act and not run to the court for relief prematurely.

All Parties Affected By A Court Order Must Be Made Parties To The Suit

[52] A further ground to dismiss the plaintiff's application is the principle that "All parties affected by a court order must be made parties to the suit."

[53] This principle can be seen from the Court of Appeal decision in *Saujana Resort (M) Bhd v. Chin Cheen Foh & Ors And Another Appeal* [2021] 3 CLJ 71 which held at [41]:

> It is trite that in an application for declaration, all parties who would potentially be affected by such an order must be before the court. An action for a declaration is an important device for ascertaining and determining the rights of parties. And it is settled that when a declaratory order is sought, all interested parties must be before the court. See *dicta* of Viscount Maugham in *London Passenger Transport Board v. Moscrop* [1942] AC 332 at 345 (HL) which was adopted by the Supreme Court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors And Other Appeals* [1997] 4 CLJ 253 p. 282 *vide* Lord Radcliffe's observation in *Ibeneweka v. Egbuna* [1964] 1 WLR 219, p. 226. See also *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 1 MLRA 470 & [1996] 4 CLJ 141 CA; *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trades Unions & Ors* [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 HC; and *Chia Saw Kee & Anor v. Huah Leong Holdings Sdn Bhd & Anor* [2003] 3 MLRH 46 & [2003] 8 CLJ 124 HC for an application of this principle.

[54] I hold that the failure of the plaintiff to add MCMC as a second defendant is fatal to its application.

The Failure To Add A Necessary Party As A Defendant Means There Is No Serious Issue To Be Tried

The Law

[55] The failure by a party applying for an interim injunction to add a necessary party as a defendant means there is no serious issue to be tried.

(See *Hong Kong Vegetable Oil Co Ltd v. Malin Sirinaga Wicker & Ors* [1977] CLJU 35; [1977] 1 LNS 35; [1978] 2 MLJ 13 Rajah J at pp. 15 to 16 and *Serba Dinamik Holdings Bhd v. Ernst & Young Consulting Sdn Bhd* [2022] CLJU 1634; [2022] 1 LNS 1634 Ahmad Fairuz Zainol Abidin J at [64 to 68]).

[56] In *Hong Kong Vegetable Oil Co Ltd v. Malin Sirinaga Wicker & Ors* [1977] CLJU 35; [1977] 1 LNS 35; [1978] 2 MLJ 13, Rajah J at pp. 15 to 16, held:

> Principle No. 1 'provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case'. I interpreted this principle to

A mean that once the court is satisfied that there is a serious question to be tried then the court is not to follow the previous practice of requiring a plaintiff to show a *prima facie* case before granting him an interim injunction. Therefore, in the instant case I was of the view that I had first to decide whether there is in fact and in law a serious question to be tried and again **in my view implicit in 'a serious question to be tried' is the** B **question** whether the action is properly conceived and **whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented**. In my judgment, if these elements or any of them are not present then, because of non-compliance with this principle alone, the motion should stand dismissed.

C (emphasis added)

[57] *Hong Kong Vegetable Oil Co Ltd v. Malin Sirinaga Wicker & Ors* [1977] CLJU 35; [1977] 1 LNS 35; [1978] 2 MLJ 13 Rajah J was recently applied in *Serba Dinamik Holdings Bhd v. Ernst & Young Consulting Sdn Bhd* [2022] CLJU 1634; [2022] 1 LNS 1634, where Justice Ahmad Fairuz Zainol Abidin D held:

Application not properly conceived

[64] *One element crucial for determination is whether all parties affected by the proposed injunction have been named*. In essence, it pivots on whether the E application was properly conceived.

...

[66] *Apart from the contractual provisions, EYC is obliged under the Bursa Directive and the SCA to report to regulators. As such, any order would clearly affect both regulators and their statutory powers*.

F

[67] *In this regard, the Singapore High Court case of Hong Kong Vegetable Oil Co Ltd v. Wicker And Others is instructive*: "15. Principle 1 "provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case" interpreted this principle to mean that once the court is satisfied G that there is a serious question to be tried then the court is not to follow the previous practice of requiring a plaintiff to show a *prima facie* case before granting him an interim injunction. Therefore, in the instant case I was of the view that I had first to decide whether there is in fact and in law a serious question to be tried and again in my view implicit in a serious question to be tried" is the question whether the action is properly H conceived and whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented. In my judgment, if these elements or any of them are not present then, because of non-compliance with this principle alone, the motion should stand dismissed.

I

[68] *Thus, it is clear to this Court that the Application has not been properly laid before this Court. If the relevant parties are not before the Court, the order of this Court will not be properly and effectively implemented.*

(emphasis added)

Application Of Law To Facts

[58] The MCMC is both a proper and necessary party. Absent the MCMC as a defendant, as a matter of law, there can be no serious issue to be tried.

Conclusion

[59] In view of my decision on the grounds set out above, I do not propose to consider the rest of the grounds raised by counsel.

[60] I thank both counsel for their thorough and helpful submissions, both written and oral. The court has been helped immensely by counsel.

Decision

[61] For the above reasons, I therefore dismiss the application for injunction with costs of RM40,000 subject to allocatur. Damages to be assessed.

[62] At the plaintiff's oral application made immediately after I delivered orally my decision on 11 January 2024, I have granted an *Erinford* injunction in favour of the plaintiff effective till 11 March 2024. I then had said "It is up to the plaintiff's counsel in his wisdom to decide whether to appeal against my decision today or use the time usefully to resort to the domestic remedy procedure under the MCMC Act."